Supreme Court, U.S.
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No. 04-1202

IN THE

Supreme Court of the United States

UNITED STATES, ex rel. ANN GAY and JAYNE McCABE,

Petitioners,

v.

LINCOLN TECHNICAL INSTITUTE, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Lincoln Technical Institute, Inc. has the following parent corporations:

Lincoln Educational Services Corporation

Back to School Acquisition, L.L.C.

Stonington Partners, Inc. II

No publicly held company owns 10% or more of its stock.

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INTRODUCTION

This case is a *qui tam* action against a proprietary school group doing business as Lincoln Technical Institute ("Lincoln").[1] The suit is based upon allegations by two of the school's former employees that it failed to comply with an "incentive compensation" prohibition applicable to educational institutions that participate in federal tuition assistance programs under Title IV of the Higher Education Act ("HEA"), 20 U.S.C. § 1078, *et seq.* Petitioners asserted below that Lincoln failed to comply with HEA rules against incentive compensation for admissions and recruitment personnel,[2] and consequently must have violated the False Claims Act, 31 U.S.C. § 3729 ("FCA"), because it participated in HEA student loan and grant programs.

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1. Respondent wishes to correct Petitioners' misleading assertion that Lincoln "teaches auto mechanics and charges $28,000 in tuition." Petition at 5. This contention has no pertinence to any issue raised by the Petition, and no such "fact" appears in the record below. Moreover, while Lincoln does offer courses in auto mechanics, it also offers a wide range of programs and courses in other areas, including business administration, applied business accounting, practical nursing, PC support, medical administration, and culinary arts. Lincoln does offer two Associate Degree programs (in the area of Automotive and Diesel Technology) for which tuition is $28,540 for a 23.4 month long course of study.

2. Lincoln has at all times denied that it engaged in any violation of incentive compensation prohibitions.

COUNTERSTATEMENT OF THE CASE

A. *Institutional Eligibility and Compliance with the Incentive Compensation Rule*

Regulations promulgated by the Department of Education ("DOE") to implement the HEA with respect to the so-called "incentive compensation ban" make it clear that non-compliance with this rule does not automatically or necessarily disqualify the institution from continued participation in HEA programs, or from continued receipt of tuition payments from students who receive federally sponsored loan or grant funds. To the contrary, the administrative enforcement mechanisms available to the DOE in administering Title IV tuition assistance programs include sanctioning a non-complying institution through the imposition of fines, as an alternative to other enforcement sanctions that could prospectively impact an institution's Title IV program participation. *See* 34 C.F.R. §§ 668.81-668.98, especially at § 668.84(a)(1)(i). Thus even confirmed non-compliance with incentive compensation rules does not necessarily imply any interruption of an institution's status as an eligible institution participating in HEA programs.

The prohibition against incentive compensation is not among the criteria that the HEA articulates "[i]n order to be an eligible institution" for purposes of a HEA Title IV program. Such status, according to the statute, requires that an institution: (1) be an "institution of higher education"[3] *or*

3. The statute expressly provides that an "institution of higher education" includes a "proprietary institution of higher education." 20 U.S.C. § 1002(a)(1). Petitioners conceded below, moreover, that each of Lincoln's school campus locations "meets the principal criteria of a proprietary institution of higher education . . . under 20 U.S.C. § 1002(b)." Plaintiff's First Amended Complaint, ¶ 12.

an eligible institution as defined for the purpose of a specific program, and (2) enter into a Program Participation Agreement ("PPA")[4] with the Secretary. *See* 20 U.S.C. § 1094(a). More specifically, the "Principal Criteria" set out in the HEA for establishing an institution's qualifications as a "proprietary institution of higher education" (and accordingly its status as an "eligible institution" upon execution of the requisite PPA, under the statutory definition of an "eligible institution" that appears at Section 1094(a)) include various fiscal, programmatic, and accreditation requirements, but do not include compliance with incentive compensation prohibitions. *See* 20 U.S.C. § 1002(b).

Consistent with these statutory provisions, federal regulations implementing the HEA provide that an institution is an "eligible institution" upon being determined to satisfy all "statutory and regulatory eligibility requirements" and upon the Secretary signing the institution's PPA. Those statutory and regulatory requirements are met if an institution satisfies the criteria set forth in 34 C.F.R. § 600.5 for qualifying as a proprietary institution of higher education and does not meet any of the criteria set forth at § 600.7 that would disqualify the school as an "eligible institution." The regulatory list of disqualifying factors makes no reference to compliance or noncompliance with the incentive compensation prohibition. *See* 34 C.F.R. § 600.7.

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4. An executed PPA, as required by the statute, sets out a long list of requirements and prohibitions with which a participating institution agrees to comply as a condition of eligibility to participate in HEA programs.

B. ***Petitioners' Complaint as Filed Before the District Court***

Petitioners' complaint[5] before the district court alleged that Lincoln had entered into a number of PPAs in which it had agreed to comply with the incentive compensation prohibition, and that Lincoln had nevertheless failed to so comply. A substantial number of the factual assertions of the complaint purporting to allege false claims simply described, without specific reference to Lincoln, procedures and requirements that apply generically to schools participating in HEA Title IV programs. *See* First Amended Complaint ("FAC") at ¶¶ 20-29. Relying on this "factual" foundation in combination with the allegation of incentive compensation violations, the FAC alleged in conclusory fashion that Lincoln had "submitted false claims for payment" or "made" false claims in the course of the generically described procedures in which schools that participate in Title IV HEA programs ordinarily engage. *Id.* at ¶ 19. *See also* ¶¶ 31-36, 49-50. The complaint did not specify particular acts by Lincoln alleged to constitute making or submitting false claims within the meaning of the FCA, and indeed failed to provide details identifying any specific claim or false claim Lincoln allegedly made.

Except for wholly conclusory allegations essentially tracking the language of the FCA,[6] the complaint contained

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5. For purposes of this Response, we occasionally use the term "complaint" to refer to the First Amended Complaint filed by the Petitioners (Relators below) in the district court. Lincoln moved to dismiss the original Complaint for failure to comply with Federal Rule of Civil Procedure 9(b) and for failure to state a claim on which relief can be granted. Relators responded by filing a First Amended Complaint instead of an opposition to the Motion, and Lincoln subsequently moved to dismiss the First Amended Complaint.

6. *See* First Amended Complaint at ¶¶ 55, 57-58.

no allegation that Lincoln engaged in any specific act so as to "cause" another party to make a false claim or claims, but only alleged that Lincoln itself had made or submitted the claims giving rise to FCA liability. *See* FAC ¶¶ 19, 31-36, 49-50. Nor did the complaint allege that any of the criteria identified in federal regulations at 34 C.F.R. § 600.7 as disqualifying a proprietary institution from eligibility to participate in HEA programs applied in Lincoln's case. To the contrary, the FAC affirmatively alleged that each of Lincoln's campus locations meets the criteria for qualifying as a proprietary institution of higher education, and that Lincoln executed PPAs with the Secretary for its various campuses. FAC ¶¶ 12-13. Thus, in effect, the complaint alleged that Lincoln met both of the criteria identified in federal regulations as requisite to status as an "eligible institution" for purposes of participation in Title IV HEA programs. Nevertheless, the complaint alleged that Lincoln's participation in HEA student loan and grant programs carried with it an implied "certification" of compliance with incentive compensation prohibitions because such compliance was a necessary condition to the school's "eligibility" to participate in those programs.

C. *The Decisions Below*

The district court, in an unpublished opinion, dismissed Petitioners' complaint for failure to state a claim under the FCA, holding that the complaint failed to allege facts "with the requisite particularity" to make out a claim under the FCA. As the court explained in its ruling:

> The Relator's Complaint contains general and conclusory allegations that Lincoln submitted claims for student financial aid under Title IV, but

> it fails to provide the requisite particulars. Rather than describing any specific request or demand by Lincoln on the government for money, Relators provide only a generic description of Lincoln's program procedures in HEA student loan programs.

United States ex rel. Gay v. Lincoln Technical Institute, Inc., 2003 WL 22474586 at *2 (N.D. Tex.), Petition at 6a.

Although this articulation of the deficiencies in the complaint represented the essential holding of the district court, the court nevertheless went on to explain, in *dicta*, that "[e]ven if Relators had alleged sufficient facts, they would have still failed to state a cognizable claim under the False Claims Act." *Id.* The court observed that the Federal Family Education Loan Program ("FFELP") does not involve Lincoln making any claim for government funds (as the complaint alleged generally),[7] and that even assuming Pell Grant applications may be considered to represent a "claim" for government funds by the educational institution, the complaint contained nothing to support a contention that any false information or statement appeared on any such applications by Lincoln students so as to render the claims "false."

The court further explained that "[e]ven if a claim in the context of the False Claims Act had been alleged" Petitioners false certification theories would have been inadequate to establish the "falsity" of the claims.[8] The court observed that

7. *Lincoln Technical Institute*, 2003 WL 22474586 at *2, Petition at 6a-7a.

8. *Lincoln Technical Institute*, 2003 WL 22474586 at *3, Petition at 7a.

under Fifth Circuit precedent, to constitute a valid basis for a false certification claim under the False Claims Act, the certification at issue would have to be a prerequisite to receiving a government benefit.[9] The court expressed its view that the facts alleged were insufficient to establish that Lincoln either expressly or impliedly certified compliance with the incentive compensation ban, or to support Petitioners' contention of express certification of compliance through certain "management assertion" letters to Lincoln's private auditors. Furthermore, the court added that even if some knowing, false certification had been established, the complaint presented nothing to establish that Lincoln made any false certification – either express or implied – as a condition of payment.[10]

The Court also rejected a fraud in the inducement theory, based on the inadequacy of Petitioners' factual contentions. Although, as the court noted, the complaint set out the "bare assertion" that Lincoln entered into PPAs that included an incentive compensation provision despite having, allegedly, "no intention of complying" with the provision,[11] the complaint presented no facts in support of this contention. Citing this Court's Opinion in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542-43, 63 S. Ct. 379 (1943), the district court noted

9. *Lincoln Technical Institute*, 2003 WL 22474586 at *3, Petition at 8a. Since this was the case, as the court explained, it was unnecessary to determine whether implied certification was a viable theory of FCA liability under Fifth Circuit law, because the allegations of the complaint failed to make out a viable case under either an express or implied certification theory.

10. *Lincoln Technical Institute*, 2003 WL 22474586 at *4, Petition at 8a-9a.

11. *Lincoln Technical Institute*, 2003 WL 22474586 at *4, Petition at 9a.

that the mere fact of noncompliance with a term of an agreement is, by itself, an insufficient basis from which to infer the requisite intent to fraudulently induce government payment of a claim.

On appeal, the reviewing panel of the Fifth Circuit Court of Appeals issued an unpublished, *per curiam* Opinion that affirmed the district court's judgment that the case was properly dismissed for failure to state a claim upon which relief can be granted "for essentially the same reasons . . . stated" in the district court's opinion.[12] Petitioners now seek the extraordinary measure of a Writ of Certiorari to gain this Court's review of an unpublished, *per curiam* decision, with no precedential value or binding effect except in extremely limited circumstances,[13] affirming the unpublished district court decision dismissing the above-described complaint.

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12. *United States ex rel. Gay v. Lincoln Technical Institute, Inc.*, 111 Fed. Appx. 286, 2004 WL 2341839 (5th Cir.).

13. Under Fifth Circuit Rule 47.5.4, unpublished opinions of the Court are not precedent, except under the doctrine of res judicata, collateral estoppel, or law of the case (or to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees or the like). The decision not to publish the opinion represents an assessment by the Circuit Court that its ruling does not establish any new rule of law or alter or modify an existing rule of law; apply an established rule of law to facts significantly different from those in previously published opinions applying the rule; explain, criticize or review the history of existing decisional or enacted law; create or resolve a conflict of authority within the Circuit or with another Circuit; or concern or discuss a factual or legal issue of significant public interest. *See* Fifth Circuit Rule 47.5.1. Petitioners moved for publication of the decision in this case, but the Circuit Court denied that motion.

REASONS FOR DENYING THE PETITION

A. *There is No Compelling Reason for This Court's Review*

The Petition presents no reason, let alone any compelling one, why this case merits review in this Court on a Writ of Certiorari. Although the Petitioners attempt to reargue – and to some extent to re-plead – their case in papers in support of the Writ, they entirely fail to identify any inconsistency of the lower court decision with precedents of this Court, any split between the Circuits on any point of law decided in this case, or any important question of federal law that was decided in this case and has not been, but should be, settled by this Court.

Petitioners characterize the lower court decision as creating a legally unfounded "distinction . . . between conditions of participation and conditions of payment" for purposes of applying false certification theories, and as a holding that liability lies under the FCA in the context of programs involving disbursement of federal funds only where the governing statute contains an express statement that certification of compliance with certain conditions or rules is a condition of payment (as distinguished from participation).[14] Yet no such holding appears in the district court's opinion or the Fifth Circuit's affirmance of that decision. Neither of those courts' opinions contains any reference at all to a distinction between conditions of payment as opposed to participation, and there is no basis to believe that such a distinction had any legally significant effect on the outcome of the case. Nor did either the trial or appellate court pronounce any "requirement" that a governing statute

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14. *See* Petition at 8-9, 12-13.

must expressly condition payment on some aspect of compliance in order for FCA theories of liability to apply. The district court did observe, in *dicta*, that compliance would have had to be a condition of payment in order to support an implied false certification theory of the case, and that the factual allegations of the complaint inadequately supported this premise.[15] No mention was made, however, of whether an *express* statutory provision would be needed to establish the condition, or whether it might be sufficiently established by the facts and operational realities of participation in a relevant federal program. Contrary to Petitioners' assertions, nothing decided below suggests a requirement that a statute contain specific "magic words" in order for FCA liability to potentially arise from federal program activities governed by the statute.

Petitioners' assertions of conflict with the law of other Circuits are equally ephemeral. The only reference to alleged direct conflict with any specific precedent in another federal

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15. The underlying rationale of the principle espoused by the court, in *dictum*, essentially restates the axiomatic FCA rule that a payment alone, absent an accompanying false claim upon which such payment is premised, does not constitute a false claim. *See United States v. Southland Mgmt. Corp.*, 288 F.3d 665, 675 (5th Cir. 2002) ("For the Defendants to be liable under [the FCA], courts agree that the Government must demonstrate that: (1) the Defendants made a claim against [the Government]; (2) the claim was false or fraudulent; and (3) the Defendants knew the claim was false or fraudulent."); *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 182 (3d Cir. 2001) (same); *United States v. Basin Elec. Power Coop.*, 248 F.3d 781, 803 (8th Cir. 2001) (same). The district court's observation further supported the ruling below that the complaint was woefully lacking in factual basis or detail and therefore stated no claim. The district court's observation presents no novel, conflicting, or significant ruling worthy of consideration by this Court.

Circuit appears at page 8 of the Petition. There, citing *United States ex rel. Quinn v. Omnicare, Inc.*, 382 F.3d 432, 441-43 (3d Cir. 2004) ("*Omnicare*"), Petitioners state that the "purported distinction made by the Fifth Circuit between conditions of participation and payment was squarely rejected by the Third Circuit." To begin with, as already discussed, no such "purported distinction" was ever articulated in this case, much less served as any significant part of the basis for the Fifth Circuit's ruling. Moreover, it can hardly be said that *Omnicare* "squarely rejected" such a distinction, as it had no pertinence to the actual grounds for the Third Circuit's holding.

Omnicare involved a claim that a pharmacy had made a false certification of compliance with Medicaid requirements and submitted false claims by recycling returned medications that had previously been paid for by Medicaid. In discussing the claim, the Third Circuit observed that even without an express statutory statement that Medicaid payment was conditioned on compliance with rules that would have precluded the alleged double-billing of Medicaid for recycled (*i.e.*, returned) drugs, the court nevertheless regarded noncompliance as relevant to the Medicaid agency's decision to pay the pharmacy. This analysis did not constitute any part of the holding in the case, however, because the court concluded that the facts of the case were nevertheless inadequate to support a finding of false certification. *See Omnicare*, 382 F.3d at 448.

Thus, in essence, Petitioners attempt to construct a "split" in Circuit authority by asserting that their inaccurate reading of *dicta* in the district court's opinion in this case is not precisely consonant with the Third Circuit's *dicta* in another case where, as here, no FCA liability was ultimately found

to exist. This case presents no decision on a point of law that conflicts with decisional law of another Circuit, and might thereby warrant consideration by this Court.

Petitioners also cite, in footnotes, a number of decisions from other Circuits that have found FCA liability to attach in situations Petitioners argue are analogous to that of alleged institutional noncompliance with the incentive compensation provision in PPAs. *See* Petition at 9 n.20. But while these cases may pertain to some degree to the legal theories Petitioners advanced below, there is none that concerns the specific context of alleged noncompliance with HEA conditions of participation, and none that contains a holding directly on-point with this case. Accordingly, even Petitioners make no pretense of identifying a specific holding in any specific case as directly in conflict with a legal ruling or principle pronounced by the Fifth Circuit in this action.

Petitioners fare no better in identifying Supreme Court precedents that can be characterized as contradictory to the Fifth Circuit's decision. They assert broadly that the Fifth Circuit "holding that defaulted student loans paid by the Government and educational grants paid to students are not 'claims for payment' as to the ineligible schools that receive such funds from students is an unduly narrow reading of the False Claims Act, and contrary to the decisions of this Court." Petition at 12. Yet remarkably, Petitioners fail to accompany this assertion with citation to any specific Supreme Court case with which the instant Circuit Court ruling is allegedly inconsistent. One searches the Petition in vain for citation to a precedent of this Court that could credibly be argued to contradict a point of law actually decided below.

It should be noted in this regard that the various cases cited by Petitioners for the proposition that a person can be liable under the FCA for knowingly causing a third party to make a false claim are in no way contradicted by the Fifth Circuit's ruling. The Petition suggests that the Fifth Circuit erroneously failed to recognize that Lincoln could be liable, not just for making false claims directly, but for causing students or guaranty agencies to submit false claims to the government. *See* Petition at 9, 11-12. However, Petitioners failed to advance this theory in their pleadings below with any specificity, and stated no particularized factual allegation that Lincoln knowingly acted so as to "cause" third parties to make claims to the government that were unwittingly false.[16] Rather, the Complaint expressly and repeatedly alleged that Lincoln itself had made or "submitted" false claims. *See* FAC at ¶¶ 19, 31-36, 50-51.

The district court – and the affirming panel of the Court of Appeals – declined to rewrite Petitioners' complaint for them based on conclusory assertions of statutory violations and a merely generic description of HEA programs and

16. The Amended Complaint did, in summarizing the counts of the complaint, set forth conclusory assertions that Lincoln "made and caused to be made a false record or statement to obtain payments from the United States Government" (First Amended Complaint ¶ 55), that Lincoln "presented, or caused to be presented . . . a false or fraudulent claim for payment" (First Amended Complaint ¶ 57), and that Lincoln "made, used, or caused to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government" (First Amended Complaint ¶ 58). Other than these boilerplate reiterations of language from the FCA, however, the complaint failed to set forth any factual allegations describing how and in what circumstances Lincoln caused any particular third party to make a false record to obtain payments, get a false claim paid, or present a false claim.

procedures, and found the facts as pled inadequate to support Petitioners' primary legal claim – *i.e.*, that Lincoln had made false claims. Petitioners cannot cure the defects in their pleadings by reinventing their case in papers seeking a Writ of Certiorari. The ruling in this case did not purport to decide any question of federal law in a manner that conflicts with Supreme Court precedents establishing causation of third party action as a basis for FCA liability, because that theory was not effectively raised nor specifically addressed below.

B. *The Questions Proposed by Petitioners are Not Presented Here*

Petitioners are utterly unsuccessful in identifying any important legal question decided by this case and of a character that would benefit from resolution by this Court. The first question Petitioners posit as warranting review in this case seemingly suggests the frankly preposterous proposition that the language of a statute external to the FCA can alone be "sufficient to state a cause of action under the False Claims Act." The misconception that mere statutory, regulatory or contractual noncompliance is a *per se* violation of the FCA may explain the paucity of particular facts Petitioners chose to include in their pleadings below. But it remains clear that an FCA cause of action requires, at a minimum, the presentment of a claim to the government that is legally false.[17]

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17. *See Southland Mgmt. Corp.*, 288 F.3d at 675 ("For the Defendants to be liable under [the FCA], courts agree that the Government must demonstrate that: (1) the Defendants made a claim against [the Government]; (2) the claim was false or fraudulent; and (3) the Defendants knew the claim was false or fraudulent."); *Hutchins*, 253 F.3d at 182 (same); *Basin Elec. Power Coop.*, 248 F.3d at 803 (same).

It is also clear that stating a cause of action under the FCA, as in pleading any case of fraud, requires that the facts of the alleged fraud be stated with particularity. *See* Federal Rule of Civil Procedure 9(b).[18] Thus whether the language of an external statute like the HEA is "sufficient" by itself to state an FCA cause of action – absent allegations of particular facts establishing that the defendant engaged in specific conduct to make or cause a false claim – can hardly be deemed a serious question.

The second question posited by Petitioners further underscores Petitioners' apparent misunderstanding of the lower court ruling and the significance of their own pleading omissions. Petitioners' articulate their second question for review as

> Whether federally insured student loans and educational grants made to students who attend

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18. *See also United States ex rel. Costner v. United States*, 317 F.3d 883, 888 (8th Cir. 2003) ("A complaint alleging violations of the False Claims Act must be pled with particularity pursuant to Rule 9(b)."); *United States ex rel. Totten v. Bombardier Corp. and Envirovac, Inc.*, 286 F.3d 542, 551-52 (D.C. Cir. 2002) ("Every circuit to consider the issue has held that, because the False Claims Act is self-evidently an anti-fraud statute, complaints brought under it must comply with Rule 9(b).") As the First Circuit explained in *Doyle v. Hasbro, Inc.*, 103 F.3d 186, 194 (1st Cir. 1996),

> Rule 9 imposes a heightened pleading requirement for allegations of fraud in order to give notice to defendants of the plaintiffs' claim, to protect defendants whose reputation may be harmed by meritless claims of fraud, to discourage 'strike suits,' and to prevent the filing of suits that simply hope to uncover relevant information during discovery.

> proprietary schools are "claims for payment" as to the school that receives such money from its students, and can thus be recovered from the school under the False Claims Act in cases where the school violates the Higher Education Act eligibility requirements.

To begin with, the question of whether educational grants to students represent "claims for payment" as to participating schools was not decided adversely to Petitioners in the proceedings below. The district court opinion – essentially adopted *in toto* by the Court of Appeals – did not decide the issue definitively, but stated that "it appears Pell Grant applications may be a 'claim' under the False Claims Act as to the educational institution as well as the student."[19] (*Lincoln Technical Institute*, 2003 WL 22474586 at *3, Petition at 7a). Thus it is unaccountable why Petitioners feel that question needs to be revisited in this case. The court rejected Petitioners' contention of FCA liability in the grant context – not because it considered Lincoln not to have made a claim, but because the complaint failed to allege facts sufficient to support a conclusion that any claim made was false.

As for the question of whether the participating institution makes any potentially false claim for payment in the context of federal student loan programs, the opinion below is entirely consonant with the law as set forth in the Petitioners' own analysis of the case. The district court noted that a HEA participating school does not receive government funds when a loan occurs or if a default occurs, but instead

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19. We disagree with this *dicta* of the district court, but regard the error as harmless in light of the court's ultimate ruling.

the demand for payment from the government (*i.e.*, a claim) "comes from the guaranteeing agency or organization, not [the school]." (*Lincoln Technical Institute*, 2003 WL 22474586 at *2, Petition at 7a). Similarly, Petitioners explicitly acknowledge that "[u]nder FFELP, which includes Stafford Loans, the guaranty agency makes the eventual claim for payment by the United States." Petition at 5; *see also* Petition at 12. Petitioners also acknowledge that even when a student defaults on a loan, a state guaranty agency first takes assignment of the loan "for collection action" and is only reimbursed by DOE "[i]f, in turn, the guaranty agency is unable to collect from the borrower." Only under these circumstances, even according to Petitioners, is "the government ultimately called upon to satisfy the claims for payment as of right." Petition at 5. The district court reached the identical conclusion, explaining that if a student defaults, the lender is reimbursed for the outstanding loan by the guaranty agency, which takes assignment of the loan and attempts to collect the unpaid balance. DOE is called upon to make a payment to reimburse the guarantee agency only "[i]f the agency fails to collect the money," and a claim cognizable under the FCA occurs in this context only when the government must make payment. *Lincoln Technical Institute*, 2003 WL 22474586 at *2, Petition at 7a.

In other words, it is difficult to discern even any real disagreement by Petitioners with the legal and factual premises underlying the district court's analysis of whether, when, and by whom claims for government payments are made in HEA student loan programs, let alone any arguably incorrect decision on this point. The district court had before it a complaint that alleged claims "*submitted by Lincoln*" in student loan programs, but no specific facts supporting the contention that such claims were made by the school. It had

before it a complaint that alleged the existence of "defaults" but did not specifically allege any of the government payments (or calls upon the government by guaranty agencies to make payment) that Petitioners concede may occur only *if* collection efforts by the guaranty agency fail (*i.e.*, not automatically upon default). The complaint claimed liability under the False Claims Act, but failed to allege specific facts demonstrating that any claims allegedly made – by anyone – were false. Petitioners, as the district court stated, failed to include the "requisite particulars" in its factual allegations in their complaint; and the result in this case is more a reflection of that deficiency than any judicial resolution of significant legal issues.

Finally, even if Petitioners were correct – which they are not – that the Fifth Circuit's decision "added a new element to the False Claims Act that requires statutes appropriating federal money to explicitly state that the condition is a prerequisite to payment in order to be actionable," Petitioners vastly overstate the significance of such a decision.

They assert, for example, that the Fifth Circuit's decision leaves the Government "without remedy to recover defaulted student loans and educational grants from ineligible schools if suit cannot be brought under the False Claims Act." This is demonstrably inaccurate, as administrative enforcement mechanisms provided for in federal regulations enable DOE to impose substantial fines on schools that fail to comply with PPA provisions or conditions of eligibility. *See* 34 C.F.R. § 668.84(a)(1)(i). Furthermore, as the case of *LTV Educ. Systems, Inc. v. Bell*, 862 F.2d 1168 (5th Cir. 1989), illustrates, there are legal theories other than FCA liability through which it may be possible for the government to seek recoupment of

improperly paid assistance under HEA programs. There is simply no basis to conclude that, as Petitioners suggest, this case represents any decision on an issue with broad "ramifications" for the enforcement of PPA terms under the HEA, let alone enforcement of Government contracts and programs generally, or that it will in any way interfere with the Government's capacity to "collect on . . existing Government contracts." *See* Petition at i.

CONCLUSION

The Petition for a Writ should be denied, as it meets none of the standards ordinarily applied by the Court in selecting appropriate cases for its review. The Fifth Circuit's decision at issue represents the application of uncontroversial principles of law (notably the principle that the facts pled to make out a cause of action under the FCA must meet a heightened standard of "particularity"[20]) to the facts as Petitioners pled them below. That neither the district court nor the Fifth Circuit considered it the court's role to fill in the gaps in Petitioners' pleadings when facts were not alleged with the "requisite particularity" to stating an FCA cause of action, implies no judicial error, and most certainly does not create any compelling justification that is an adequate ground for grant of a Writ of Certiorari.

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20. *See Costner*, 317 F.3d at 888; *Bombardier Corp. and Envirovac, Inc.*, 286 F.3d at 551-52; *Doyle*, 103 F.3d at 194.

Respectfully submitted,

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